Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

WASHINGTON STATE DEPARTMENT OF HEALTH,

Petitioner,

v.

ALICE ONGOM,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Alice Ongom's registration to practice as a nursing assistant was suspended for twenty-four months after an administrative law judge found, by a preponderance of the evidence, that Ongom slapped, kicked, and threw a cup at an Alzheimers patient in her care.

Does the Due Process Clause of the Fourteenth Amendment require the state to apply the clear and convincing evidence standard of proof, instead of the preponderance of the evidence standard, to suspend or revoke a license to work as a health care provider?

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Washington, on behalf of the Washington State Department of Health, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Washington in this case.

OPINIONS BELOW

The opinion of the Washington Supreme Court is reported at 159 Wash. 2d 132, 148 P.3d 1029. App. 1. The opinion of the Washington Court of Appeals is reported at 124 Wash. App. 935, 104 P.3d 29. App. 40. The Findings Of Fact, Conclusions Of Law, Judgment And Order of the King County Superior Court is unpublished. App. 57. The Order Denying Respondent's Petition For Reconsideration and the Findings Of Fact, Conclusions Of Law, And Final Order of the Washington Department of Health are unpublished. App. 60, 70.

JURISDICTION

The judgment of the Washington Supreme Court was entered December 14, 2006. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in part "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

Wash. Admin. Code 246-10-606 provides in part: "The order shall be based on the kind of evidence upon which reasonably prudent persons are accustomed to rely in the conduct of their affairs. . . . [T]he burden is on the department to prove the alleged factual basis set forth in the initiating document. Except as otherwise provided by statute, the burden in all cases is a preponderance of the evidence." App. 185.

Other statutes relevant to this case are set out in the appendix. These include the laws governing the

licensing and regulation of nursing assistants, Wash. Rev. Code 18.88A (App. 84–94); the Uniform Disciplinary Act, Wash. Rev. Code 18.130 (App. 95–129); the Administrative Procedure Ac (App. 130–54), and the regulations governing adjudicative proceedings under that Act, Wash. Admin. Code 246-10 (App. 155–91).

STATEMENT

1. Regulation Of Nursing Assistants

Article XX, section 2 of the Washington Constitution provides: "The legislature shall enact laws to regulate the practice of medicine and surgery, and the sale of drugs and medicines." App. 83. Consistent with this constitutional command, Washington has adopted comprehensive laws regulating health care practitioners, including nursing assistants.

a. Registration

The Department of Health (the Department) licenses nursing assistants. A nursing assistant is an individual "who, under the direction and supervision of a registered nurse or licensed practical nurse, assists in the delivery of nursing and nursing-related activities to patients in a health care facility." Wash. Rev. Code § 18.88A.020(4), App. 85. Nursing assistants are "the principal cadre of health care workers who provide for the basic needs of patients." Wash. Rev. Code § 18.88A.010, App. 84.

The law provides that the Department "shall issue a registration to any applicant who pays any applicable fees and submits [the required forms], provided there are no grounds for denial of registration or issuance of a conditional registration under this chapter or chapter 18.130 RCW." Wash. Rev. Code § 18.88A.080(1), App. 89.[1] The

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[1] Wash. Rev. Code 18.130 is the Uniform Disciplinary Act, which, *inter alia*, defines unprofessional conduct. An individual may be denied registration as a nursing assistant if he or she had committed an act of unprofessional conduct.

application fee for registration is fifteen dollars. Wash. Admin. Code 246-841-990(2), App. 190-91. No additional training is required to be a registered nursing assistant. However, a health care facility cannot assign a registered nursing assistant to provide care unless he or she "has demonstrated skills necessary to perform competently all assigned duties and responsibilities." Wash. Rev. Code § 18.88A.030(2), App. 86.

b. Disciplinary Procedures

The Department is also responsible for disciplining nursing assistants. Wash. Rev. Code § 18.88A.150, App. 92; Wash. Rev. Code § 18.130.040(1)(a)(xii), App. 99. A nursing assistant is subject to discipline for unprofessional conduct which includes, among other standards, "[a]buse of a client or patient . . . ." Wash. Rev. Code § 18.130.180(24), App. 126. A range of sanctions is available, but in selecting a sanction, the Department "must first consider what sanctions are necessary to protect or compensate the public." Wash. Rev. Code § 18.130.160, App. 114. Possible sanctions include censure, reprimand, suspension, or revocation of the license. Wash. Rev. Code § 18.130.160(1)–(2), (6), App. 113–14.

The procedures governing discipline are set out in the Uniform Disciplinary Act, Wash. Rev. Code 18.130 (App. 95). The Department can investigate a complaint or initiate its own investigation, if it has reason to believe a health care provider may have engaged in unprofessional conduct. Wash. Rev. Code § 18.130.080, App. 104–06. After an investigation, the Department will issue a statement of charges if there is reason to believe that a health care provider violated governing standards of professional conduct. At this point, the health care provider can request a hearing. Wash. Rev. Code § 18.130.090 (2004), App. 106. The hearing is governed by Washington's Administrative Procedure Act, Wash. Rev. Code 34.05. Wash. Rev. Code § 18.130.100 (2004), App. 110. In addition to the procedures in the

Administrative Procedure Act, the Washington legislature authorized the Department, in consultation with other agencies having disciplinary authority over health care professionals, to adopt uniform procedural rules. Wash. Rev. Code § 18.130.095(1)(a) (2004), App. 107–08; Wash. Admin. Code 246-10, App. 155–90.

The uniform procedural rules provide that a health care provider may be represented by counsel. Wash. Admin. Code 246-10-108(1)(a), App. 160. The rules require the complaint to state the "[f]actual basis for the action" and set out the "[s]tatutes and rules alleged to be at issue[.]" Wash. Admin. Code 246-10-201(1)(b)–(c), App. 166. The rules provide for interpreters for the hearing impaired or those who cannot readily speak or understand English, subpoenas to compel the attendance of witnesses, discovery, motions, and protective orders. Wash. Admin. Code 246-10-122, -123, -402, -403, -405, App. 161–63, 163–66, 172–78, 178–82, 182. At the conclusion of the hearing, the final order must contain findings of fact and conclusions of law. Wash. Admin. Code 246-10-702(1)(a); App. 187–88. A party may seek reconsideration of a final order, and decisions of the Department are subject to judicial review under the state Administrative Procedure Act (App. 130). Wash. Admin. Code 246-10-704, -706, App. 188–89, 189–90.

c. Standard Of Proof

The question presented in this case involves the standard of proof in an action to suspend or revoke a health care provider's license. "The preponderance of the evidence standard requires that the evidence establish the proposition at issue is more probably true than not true." *Mohr v. Grant*, 153 Wash. 2d 812, 822, 108 P.3d 768 (2005). On the other hand, "[c]lear, cogent and convincing evidence exists when the evidence shows the ultimate fact at issue to be highly probable." *In re the Dependency of K.S.C.*, 137 Wash. 2d 918, 925, 976 P.2d 113 (1999).

Pursuant to its statutory authority to adopt uniform procedural rules, the Department adopted a rule establishing the preponderance of the evidence as the standard of proof in disciplinary cases. Wash. Rev. Code § 18.130.095(1)(a) (2004), App. 107–10. Wash. Admin. Code 246-10-606 provides, in part:

> "*The order shall be based on the kind of evidence upon which reasonably prudent persons are accustomed to rely in the conduct of their affairs.* . . . [T]he burden is on the department to prove the alleged factual basis set forth in the initiating document. Except as otherwise provided by statute, *the burden in all cases is a preponderance of the evidence.*" Wash. Admin. Code 246-10-606, App. 185–86 (emphasis added).

Preponderance of the evidence is the standard of proof applied by 35 states and the District of Columbia in medical disciplinary cases.[2]

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[2] Twelve states' courts and the District of Columbia have held that the application of the preponderance standard in medical disciplinary cases does not violate the Due Process Clause. *See* note 4 *infra* p. 24.

Nine states have specifically established the preponderance standard in medical disciplinary hearings by statute or administrative rule. *See* Del. Code Adm. tit. 24, 500-7.2.5; Haw. Rev. Stat. § 91-10(5); Ky. Rev. Stat. Ann. § 13B.090(7); 02-415-04 Me. Code R. § 1(A); Mass. Gen. Laws ch. 112, § 5 (board may impose discipline "upon proof satisfactory to a majority of the board"); Md. Code Ann., Health Occ. § 14-405(b), *amended by* 2004 Md. Sess. Laws, 1st Spec. Sess., ch. 5, § 1; Mont. Code Ann. § 37-1-311; Nev. Rev. Stat. 630.352(1); Tenn. Comp. R. & Regs. 1360-4-1.02(7).

Fourteen states require a preponderance of evidence by judicial decision. These cases do not involve a due process claim. *See Ethridge v. Arizona Bd. of Nursing*, 796 P.2d 899, 904 (Ariz. 1989); *Johnson v. Arkansas Bd. of Exam's in Psychology*, 808 S.W.2d 766, 769 (Ark. 1991); *Swiller v. Comm'r of Pub. Health & Addiction Servs.*, No. HHD CV 95-0705601, 1995 WL 611754 (Conn. Super. Ct. Oct. 5, 1995) (chiropractor); *Georgia Bd. of Dentistry v. Pence*, 478 S.E.2d 437, 444 (Ga. Ct. App. 1996) (upheld preponderance standard against claim that

"reasonable doubt" should be used); *In re Med. License of Friedenson*, 574 N.W.2d 463, 466 (Minn. Ct. App. 1998); *Bever v. Bd. of Reg. for the Healing Arts*, No. WD 57880, 2001 WL 68307, at *4 (Mo. Ct. App. Jan. 30, 2001), *cause ordered transferred to Mo. S. Ct.* (Mar. 27, 2001), *reh'g denied* (Mar. 27, 2001); *Foster v. Bd. of Dentistry*, 714 P.2d 580, 582 (N.M. 1986) (but clear and convincing used where fraud alleged); *In re Kincheloe*, 157 S.E.2d 833, 841 (N.C. 1967); *Shearer v. State Med. Bd.*, 97 N.E.2d 688, 691 (Ohio Ct. App. 1950), *but see* Ohio Rev. Code Ann. § 3719.121(A), (B) (West 2001) (clear and convincing standard for disciplinary action based on illegal drug use); *Starr v. State Bd. of Med.*, 720 A.2d 183, 191 (Pa. Cmwlth. Ct. 1998); *Miele v. Bd. of Med. Licensure & Discipline*, No. 90-1930, 1991 WL 789899, at *3 (R.I. Super. Oct. 9, 1991); *Goad v. Virginia Bd. of Med.*, 40 Va. App. 621, 634 n.10, 580 S.E.2d 494, 501 n.10 (2003). Two states use a preponderance of the evidence standard, but qualify it with the higher burden of proof: In an attorney general opinion, Kansas deemed its standard of proof to be "a preponderance of evidence that is clear and convincing in nature". *See* Kan. Atty. Gen. Op. No. 95-54 (1995). Utah requires a "clear preponderance" of evidence. *See Vance v. Fordham*, 671 P.2d 124, 128 (Utah 1983).

The remaining states apply the clear and convincing evidence standard of proof. Two states required the preponderance standard by statute or regulation until they were struck down on state constitutional grounds. *Johnson v. Bd. of Governors of Registered Dentists*, 913 P.2d 1339, 1347 (Okla. 1996); *Painter v. Abels*, 998 P.2d 931, 941 (Wyo. 2000).

Two states require "clear and convincing evidence" in medical disciplinary hearings by statute. *See* Ala. Code § 34-24-90 (1975), *repealed by* Acts 1981, No. 81-218, p. 273, § 7, effective Apr. 7, 1981; Fla. Stat. Ann. § 458.331(3), *amended by* 2001 Fla. Sess. Law Serv. ch. 2001-277, §§ 21, 76 (West). *But see Rife v. Dep't of Prof'l Reg.*, 638 So. 2d 542, 543 (Fla. Dist. Ct. App. 1994) (court stated that higher standard not required to satisfy Due Process under United States Constitution).

Ten states that use "clear and convincing evidence" or its equivalent do so under the common law. *See Storrs v. State Med. Bd.*, 664 P.2d 547, 555 (Alaska 1983), *but see In re Robson*, 575 P.2d 771 (Alaska 1978) (standard of proof for attorney discipline is preponderance of evidence); *Silva v. Superior Ct.*, 14 Cal. App. 4th 562, 17 Cal. Rptr. 2d 577, 582 (1993) (struck down preponderance of evidence standard of proof based on statutory analysis); *Cooper v. Bd. of Prof'l Discipline*, 4 P.3d 561, 568 (Idaho 2000); *Schireson v. Walsh*, 187 N.E. 921, 923 (Ill. 1933) ("clearly and conclusively"); *Allen v.*

2. The Proceeding To Suspend Ongom's Registration To Practice As A Nursing Assistant

Ongom was a registered nursing assistant employed by a retirement home, in the Alzheimers Dementia Unit. After receiving a complaint and conducting an investigation, the Department filed a statement of charges against Ongom, alleging that she had engaged in unprofessional conduct under Wash. Rev. Code 18.130.180(24) by abusing a client or patient. Ongom filed an answer denying the charges and requested a hearing.

The hearing was conducted by an administrative law judge. Ongom did not obtain representation. Three witnesses testified at the hearing: Ms. Bristlin, a care giver at the facility; Ms. Umagat, the program director in charge of the Alzheimers Dementia Unit, and Ongom. In addition, the administrative law judge considered a sworn statement submitted by Ms. Chmielewski, another caregiver.

Bristlin testified that one evening she entered the dining area in the Alzheimers Dementia Unit and saw Ongom pick up a coffee cup and throw it at Resident A, hitting her in the hand. Ongom then reached across the table, grabbed Resident A's hand and slapped it, telling Resident A, don't you ever throw anything at me again. Then Ongom walked over to Resident A and

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Louisiana Bd. of Dentistry, 531 So. 2d 787, 798 (La. Ct. App. 1988), *rev'd on other grounds*, 543 So. 2d 908 (La. 1989); *McFadden v. Mississippi Bd. of Licensure*, 735 So. 2d 145, 152 (Miss. 1999); *Davis v. Wright*, 503 N.W.2d 814, 818 (Neb. 1993) (struck down preponderance of evidence standard on equal protection grounds); *In re Zar*, 434 N.W.2d 598, 602 (S.D. 1989) (making exception to preponderance standard in administrative hearings for license revocations because of important interest involved); *Clark v. West Virginia Bd. of Med.*, 508 S.E.2d 111, 121 (W. Va. 1998) (where licensee charged with fraudulently obtaining license). Although a specific authority on point could not be found, it is presumed that the clear and convincing evidence standard is used in Indiana.

kicked her in the ankle three times. Bristlin testified that she took Resident A out of the dining room where Resident A complained that her hand and ankle hurt. Bristlin stated that Resident A could be combative. The next day Bristlin reported the incident to Umagat.

Umagat testified that Resident A had Alzheimers in the later stages. She further testified that Bristlin reported to her regarding the incident between Ongom and Resident A. Umagat testified that when she asked Ongom about the incident, Ongom denied it. When Umagat told Ongom there was a witness, Ongom stated that she had tripped over Resident A's foot. Other residents in the unit were unable to give statements. Umagat testified that she also spoke with Chmielewski, who told her that she did not observe the incident. Finally, Umagat testified that when she examined Resident A the day after the incident, she had a bruise and swelling from the bottom of the kneecap down to her ankle.

Ongom testified that Resident A threw a glass that hit her in the shoulder. Ongom was in the process of picking up the glass when she saw Resident A pick up a plate, preparing to throw it. Ongom testified that she left the glass on the floor and snatched the plate out of Resident A's hand, because Ongom was afraid that it would land on another resident in a wheel chair behind her. Ongom also presented a sworn statement by Chmielewski which stated that she saw Resident A throw a glass at Ongom, but she did not see Ongom touch or throw anything at Resident A.

The administrative law judge issued the Findings Of Fact, Conclusions Of Law And Final Order. App. 70–82. He stated that there was uncertainty about the applicable standard of proof in light of the decision of the Washington Supreme Court in *Nguyen v. Department of Health, Medical Quality Assurance Commission*, 144 Wash. 2d 516, 29 P.3d 689 (2001), *cert. denied*, *Washington State Medical Quality Assurance Commission*

v. Nguyen, 535 U.S. 904 (2002). In *Nyugen*, a divided court held that the Due Process Clause required clear and convincing evidence to revoke a license to practice medicine. However, in *Eidson v. Department of Licensing*, 108 Wash. App. 712, 32 P.3d 1039 (2001), Washington's intermediate appellate court held that *Nguyen* did not extend to all professional licenses. App. 78–79 ¶ 4.3. Given this uncertainty, the administrative law judge applied both standards and concluded that the Department "has proven by a preponderance of the evidence, but not by clear and convincing evidence, that [Ongom's] conduct violated RCW 18.130.180(24) (regarding abuse of a client)." App. 79 ¶ 4.5. The judge concluded that the Department did not prove its case by clear and convincing evidence because "there are conflicting witness statements whether [Ongom] touched Resident A or threw anything at Resident A." App. 80 ¶ 4.6. "Additionally, there was a period of time between the time the incident in question [sic], and when Resident A's injury was diagnosed or assessed." App. 80 ¶ 4.6. Ongom filed a petition for reconsideration that was denied. Order Denying Respondent's Petition For Reconsideration, App. 60.

3. Judicial Review

Ongom filed a petition for judicial review. The superior court affirmed the Department's final order. Findings Of Fact, Conclusions Of Law, Judgment And Order, App. 57–59. The court concluded that "[t]he findings of fact contained in the Department's final order are supported by substantial evidence." App. 58 ¶ 2.2. The court also concluded that "[Ongom] has not demonstrated that the Department erred in applying the preponderance of evidence standard of proof in a registered nursing assistant disciplinary case." App. 58 ¶ 2.3.

a. Court Of Appeals

Ongom appealed the superior court decision to the Washington Court of Appeals, which affirmed. The court distinguished *Nguyen*, concluding that the factors from *Mathews v. Eldridge*, 424 U.S. 319 (1976), applied differently to a nursing assistant registration than to a license to practice medicine. In *Mathews*, the Court held that "the specific dictates of due process generally requires consideration of three distinct factors . . . ." *Mathews*, 424 U.S. at 335. First, "the private interest that will be affected by the official action . . . ." *Id.* Second, "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards . . . ." *Id.* Third, "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.*

First, the court of appeals examined Ongom's private interest in her nursing assistant registration. The court concluded that the license was a "significant property interest" but it was not "equivalent to a medical license for purposes of due process analysis." App. 46 ¶ 14. The court contrasted "the rigorous education, training, and examination at enormous expense" to obtain a doctor's license with the fact that nursing assistants "have no educational or training requirements at all[.]" App. 46 ¶ 15. With regard to stigma, the court of appeals concluded that the loss of a nursing assistant license "does not approach the significant stigma attached to loss of the right to practice medicine." App. 49 ¶ 17. Thus, "[t]he license does not amount to a compelling property or liberty interest, nor does its loss carry with it a significant stigma." App. 50 ¶ 20.

Second, the court of appeals considered the risk of error. In contrast to the subjective nature of the claims against Dr. Nguyen, the court stated that the claims

against Ongom "are not at all subjective. She was accused of slapping, kicking, and throwing objects at a patient under her care." App. 52 ¶ 24. "The use of an objective standard lessens the need for a more stringent standard of proof." App. 52–53 ¶ 24.

Third, the court of appeals considered the government interest. The court held that the government "has a substantial interest in protecting the public from incompetent or abusive nursing assistants." App. 53–54 ¶ 27. The court concluded that "[a] preponderance of the evidence standard of proof makes it more likely that abusive or unscrupulous nursing assistants are properly disciplined." App. 54 ¶ 27.

After concluding that the preponderance of the evidence standard was proper, the court of appeals affirmed the Department's decision suspending Ongom's nursing assistant registration. App. 54–56 ¶¶ 29–32.

b. The Washington Supreme Court

Ongom petitioned the Washington Supreme Court for discretionary review. The court granted the petition and, in a 5:4 decision, reversed. The majority ruled that "this case is on all fours with *Nguyen*: The minimum constitutional standard of proof in a professional disciplinary hearing is clear and convincing evidence." App. 13 ¶ 23. In *Nguyen*, a divided Washington Supreme Court applied the three factors from *Mathews* and held that a preponderance of the evidence standard of proof in a proceeding to revoke a license to practice medicine violated the Due Process Clause.

As to the first *Mathews* factor, the private interest at stake, the majority in *Nguyen* ruled that Dr. Nguyen had a "profound" interest in his medical license. *Nguyen*, 144 Wash. 2d 527. The majority pointed to the "countless hours and probably tens (if not hundreds) of thousands of dollars" involved in obtaining a doctors license, and that loss of the license "diminishes the doctor's standing in both the medical and lay communities[.]" *Nguyen*, 144

Wash. 2d at 528. The *Nguyen* majority analogized this economic loss and stigma associated with license revocation to a "significant deprivation of liberty", similar to civil commitment in *Addington v. Texas*, 441 U.S. 418 (1979), or termination of parental rights in *Santosky v. Kramer*, 455 U.S. 745 (1982). *Nguyen*, 144 Wash. 2d 527.

Adhering to the reasoning in *Nguyen*, the majority in this case reached the same conclusions with regard to Ongom's interest in her nursing assistant registration. The majority below held that while "a medical license is much more difficult to obtain than a registration to practice as a nursing assistant, each constitutes a lawful entitlement to practice one's chosen profession." App. 7–8 ¶ 14. The majority stated that it could not conclude that Ongom's "interest in earning a living as a nursing assistant is any less valuable to her than Dr. Nguyen's interest in pursuing his career as a medical doctor." App. 8 ¶ 14. The majority also stated that "[t]here is no reason to believe that the damage to [Ongom's] professional reputation in the context of her life to be any less damaging than Dr. Nguyen's." App. 8–9 ¶ 15. Thus, in both cases, "professional discipline is stigmatizing. It is more than mere money and is thus entitled to a higher standard of proof." App. 9 ¶ 15.

As to the second *Mathews* factor, the risk of an erroneous result based on the challenged procedure, the majority below again relied on *Nguyen*. The majority in *Nguyen* reasoned that procedural safeguards cannot "substitute for . . . failure to impose the requisite minimum burden of proof which is specifically designed to impress the factfinder with the importance of the decision and thereby reduce the chance of error." *Nguyen*, 144 Wash. 2d at 530 (internal quotation marks omitted). The majority below concluded that the risk of error was as great in this case as it was in *Nguyen*. App. 10 ¶ 18.

With regard to the third *Mathews* factor, the government's interest, the majority below followed

Nguyen and disagreed with the court of appeals that the government's interest involves anything more than the fiscal burden on the government that the additional process would impose. App. 11 ¶ 19. *Nguyen* held that the government's interest was limited to "the efficient and economic administration of its affairs." *Nguyen*, 144 Wash. 2d at 532. *Nguyen* concluded that this interest would not be damaged by a higher standard of proof because "[a]n increased burden of proof would not have the slightest fiscal impact upon the state, as it would not appreciably change the nature of the hearing per se." *Id.*

The majority below ruled that "[Wash. Admin. Code] 246-10-606 is invalid because it requires only a preponderance." App. 13 ¶ 23. The court "reverse[ed] the Court of Appeals, [and] dismiss[ed] the statement of charges [against Ongom]." App. 13 ¶ 23.

Four justices dissented from the decision below, concluding that *Nguyen* was wrongly decided and should be reversed. Like the three dissenting justices in *Nguyen*, the dissent below reached a different conclusion with regard to each of the *Mathew's* factors. First, with regard to the private interest involved, the dissent below concluded that *Nguyen* misapplied *Addington*. According to the dissent, *Nguyen* relied on *Addington* for the proposition that "the clear and convincing standard of proof is constitutionally required whenever an interest at stake is 'more important than the interest against erroneous imposition of a mere money judgment.' *Nguyen*, 144 Wash. 2d at 525, 29 P.3d 689." App. 23 ¶ 34 (Owens, J., dissenting). However, the dissent concluded that "[t]he *Addington* Court simply recognized that some jurisdictions use the intermediate standard and that the intermediate standard is no stranger to the civil law." App. 23 ¶ 34 (Owens, J., dissenting) (internal quotation marks omitted). According to the dissent, "[t]his is a far cry from the bright-line rule that the *Nguyen* majority labeled a constitutional requirement." App. 23

¶ 34. According to the dissent, when the first *Mathews* factor is properly applied, a "registered nursing assistant has a private interest in his or her license, [but] this interest is less significant than those private interests that have justified application of an intermediate standard of proof in other cases." App. 28 ¶ 40.

Second, with regard to the risk of error, the dissent below concluded that the majority in *Nguyen* erred because it "relied on case-specific considerations [that] the agency acted as investigator, prosecutor, and decision maker and whether the charges brought against Dr. Nguyen were primarily objective or subjective." App. 21–22 ¶ 33 (Owens, J., dissenting) (internal quotation marks omitted). According to the dissent, *Santosky*, 455 U.S. at 757, stated that this Court "never has approved case-by-case determination of the proper *standard of proof* for a given proceeding." App. 21 ¶ 32 (Owens, J., dissenting). The dissent concluded that "[i]n the present case, Ms. Ongom received substantial procedural safeguards that minimized the risk of error." App. 28 ¶ 41 (Owens, J., dissenting).

Third, with regard to the government's interest, the dissent below concluded that *Nguyen* misapplied *Mathews* by limiting the government's interest to "practical and financial burdens . . . ." App. 19 ¶ 30 (Owens, J., dissenting). The dissent stated that this holding "is contrary to the language used in *Mathews*, in which the Court described the third factor as 'the Government's interest, *including* the function involved.' 424 U.S. at 335, 96 S. Ct. 893 (emphasis added)." App. 20 ¶ 30. To properly apply the third *Mathew's* factor the dissent stated that "we should consider the governmental interest in protecting the public against abuse by health care providers." App. 29 ¶ 42.

Based on this analysis, the dissent below concluded that "preponderance of the evidence is a constitutionally permissible standard of proof in

registered nursing assistant disciplinary proceedings." App. 32 ¶ 48. The dissent found that "Ongom failed to establish that the trial court's decision was not supported by substantial evidence." App. 31 ¶ 47. Thus, the dissent would have affirmed the Department's final order.

Justice Madsen concurred in the dissent below and authored a dissenting opinion of her own. She explained, "[a]lthough I signed the majority opinion in *Nguyen*, I agree with Justice Owens that *Nguyen* was wrongly decided on the law. And, its application in this case makes clear that it is also harmful and should be overruled." App. 33 ¶ 50 (Madsen, J., concurring in the dissent).

REASONS FOR GRANTING THE PETITION

The Washington Supreme Court held that the Due Process Clause requires the state to apply the clear and convincing standard of proof, instead of the preponderance of the evidence standard, to revoke or suspend the license of a nursing assistant. This decision conflicts with decisions of this Court, and this departure from precedent is so great that it is not simply a misapplication. The majority below disregarded the holdings of this Court. The decision below also conflicts with every state court decision considering whether the preponderance of the evidence standard of proof violates the Due Process Clause in health care disciplinary proceedings. By ignoring the decisions of this Court, the majority below has put patients in Washington and other states at greater risk of exposure to unfit health care providers.

1. The Majority Below Ignored This Court's Decisions Applying The *Mathews* Factors

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court held that to determine whether administrative procedures satisfy the Due Process Clause requires the consideration of three factors. The majority below ignored the holdings of this Court with regard to each of these factors.

a. The Majority Below Ignored Decisions Of This Court Holding That A Higher Standard Of Proof Is Required Only If The First *Mathews* Factor Involves Loss Of Liberty Or A Fundamental Right

The first *Mathews* factor is "the private interest that will be affected by the official action . . . ." *Mathews*, 424 U.S. at 335. The Washington Supreme Court concluded that a medical license and a registration to practice as a nursing assistant "each constitutes a lawful entitlement to practice one's chosen profession" and that "a professional disciplinary proceeding subjects [the licensee] to grave concerns which include the potential loss of patients, diminished reputation, and professional dishonor." App. 7 ¶ 14 (quoting *Nguyen*, 144 Wash. 2d at 521). The majority below held that, for these reasons, the private interest implicated in this case was so great that the Due Process Clause required clear and convincing evidence. According to the court below, "[i]t is more than mere money and is thus entitled to a higher standard of proof." App. 9 ¶ 15.

But this Court has required a higher standard of proof under the Due Process Clause only when the private interest involved was liberty or a fundamental right. When liberty or a fundamental right were not involved, this Court has sustained the use of the preponderance standard in the face of due process challenges. The loss of a nursing license involves neither liberty nor a fundamental right. Moreover, the Court has sustained the preponderance standard when avoiding stigma was part of the private interest.

In *In re Winship*, 397 U.S. 358 (1970), the Court held that a civil proceeding to have a child declared a juvenile delinquent required the beyond a reasonable doubt standard of proof. The private interest was exposure of the juvenile "to a complete loss of his personal liberty through a state-imposed confinement away from

his home, family, and friends [and] a delinquency determination, to some extent at least, stigmatizes a youth in that it is by definition bottomed on a finding that the accused committed a crime." *Winship*, 397 U.S. at 374.

In *Addington v. Texas*, 441 U.S. 418 (1979), the Court held that the Due Process Clause required civil commitment to a mental hospital to be proven by clear and convincing evidence instead of by a preponderance. The private interest was that "civil commitment for any purpose constitutes a significant deprivation of liberty . . . ." *Addington*, 441 U.S. at 425. The Court also explained that "involuntary commitment to a mental hospital after a finding of probable dangerousness to self or others can engender adverse social consequences to the individual." *Id.* at 425–26.

In *Santosky v. Kramer*, 455 U.S. 745 (1982), the Court held that the Due Process Clause requires clear and convincing evidence instead of a preponderance to terminate parental rights. The Court described the private interest as a fundamental right. According to the Court, a "natural parent's desire for and right to the companionship, care, custody, and management of his or her children is an interest far more precious than any property right." *Santosky*, 455 U.S. at 758–759 (internal quotation marks omitted). Thus, "[w]hen the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it." *Id.* at 759.

Winship, *Addington*, and *Santosky* thus required higher standards of proof when the private interest involved was liberty or a fundamental right. Ongom's interest in her nursing license does not rise to this level. The decision below ignored these precedents when it concluded that Ongom's private interest in her nursing registration required clear and convincing evidence.

The majority below also ignored the decisions of this Court holding that due process does not require clear and convincing evidence when the private interest does not involve liberty or a fundamental right. *Vance v. Terrazas*, 444 U.S. 252 (1980), upheld the preponderance standard in proceedings to establish the loss of United States citizenship. The Court was "unable to conclude that the [preponderance] evidentiary standard provided by Congress . . . is invalid under . . . the Due Process Clause of the Fifth Amendment." *Vance*, 444 U.S. at 266. According to the Court, "expatriation proceedings are civil in nature and do not threaten a loss of liberty." *Id.* at 267. There can be no doubt that citizenship is a substantial private interest. Indeed, the Court has described United States citizenship as "the highest hope of civilized men." *Schneiderman v. United States*, 320 U.S. 118, 122 (1943). Yet, due process was satisfied by a preponderance standard.

In *Rivera v. Minnich*, 483 U.S. 574 (1987), the Court held that a state statute requiring a preponderance of the evidence to establish paternity did not violate the Due Process Clause. The Court distinguished the private interests in establishing paternity and terminating parental rights. According to the Court, the private interest at stake in paternity was economic—"avoiding the serious economic consequences that flow from a court order that establishes paternity and its correlative obligation to provide support for the child." *Rivera*, 483 U.S. at 580. And, as Justice Brennan pointed out in his dissent, there is "social stigma resulting from an adjudication of paternity . . . ." *Id.* at 585 (Brennan, J., dissenting). Nonetheless, the private interest in avoiding stigma did not compel a higher standard of proof.

The decision below that financial loss and stigma require clear and convincing evidence is also at odds with a decision in which the Court has established the standard of proof. "Where Congress has not prescribed

the appropriate standard of proof and the Constitution does not dictate a particular standard, [the Court] must prescribe one." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389 (1983). In these circumstances, the Court has applied the preponderance standard to civil actions involving both financial loss and stigma. In *Huddleston*, the Court applied the preponderance standard to actions for fraudulent misrepresentation under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b). In reaching its decision, the Court explained that "we have required proof by clear and convincing evidence where particularly important individual interests or rights are at stake." *Huddleston*, 459 U.S. at 389. The Court cited *Santosky* (proceeding to terminate parental rights), *Addington* (involuntary commitment proceeding), and *Woodby v. INS*, 385 U.S. 276, 285–86 (1966) (deportation). *Huddleston* 459 U.S. at 389. On the other hand, the "imposition of even severe civil sanctions that do not implicate such interests has been permitted after proof by a preponderance of the evidence." *Id.* at 389–90. The Court concluded that the "balance of interests in this case warrants use of the preponderance standard. On the one hand, the defendants face the risk of opprobrium that may result from a finding of fraudulent conduct . . . ." *Id.* at 390. "On the other hand, the interests of plaintiffs in such suits are significant. Defrauded investors are among the very individuals Congress sought to protect in the securities laws. If they prove that it is more likely than not that they were defrauded, they should recover." *Id.*

Indeed, the Court has explained:

> "In a number of settings, conduct that can be punished as criminal only upon proof beyond a reasonable doubt will support civil sanctions under a preponderance standard. *See, e.g., United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972); *Helvering v. Mitchell*,

303 U.S. 391 (1938); *United States v. Regan*, 232 U.S. 37 (1914)." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491 (1985).[3]

Ongom paid a fee of fifteen dollars to obtain her nursing assistant registration. She was not required to have any special training or education. The proceeding to suspend her registration did not concern physical liberty or a fundamental right. Ongom's private interest in the loss of her nursing assistant license is certainly not greater than the loss of United States citizenship in *Vance* or the establishment of paternity in *Rivera*. Nor is it greater than a defendant's private interest in an action alleging securities fraud. Despite this fact, the majority below concluded that due process required clear and convincing evidence. This departure from precedent is so great that it does not represent a simple misapplication of this Court's decisions. Rather, the majority below has ignored the decisions of this Court.

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[3] *Sedima* involved the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–1968. Under RICO, a plaintiff can bring a private action to recover treble damages for acts that could be prosecuted as crimes. The financial loss and stigma involved in such actions are surely greater than Ongom's interest in her nursing assistant registration. However, the federal circuit courts of appeal have uniformly held that preponderance of the evidence is the appropriate standard of proof in RICO actions. *United States v. Local 560 of the Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, & Helpers*, 780 F.2d 267, 280 (3d Cir. 1985) ("[w]e are satisfied that the preponderance standard applies in civil RICO litigation. While we recognize that the defendants in such actions have significant interests at stake (i.e., financial, occupational, and reputational), these interests are not sufficiently compelling to trigger a more stringent burden of proof."); *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1303 (7th Cir. 1987) ("proof by a preponderance of the evidence is sufficient for a finding of liability under civil RICO."); *Fleischhauer v. Feltner*, 879 F.2d 1290, 1296 (6th Cir. 1989) (same); *Bieter Co. v. Blomquist*, 987 F.2d 1319, 1320–21 (8th Cir. 1993) (same); *Wilcox v. First Interstate Bank of Oregon*, 815 F.2d 522, 531–32 (9th cir. 1987) (same).

b. The Majority Below Failed To Consider Existing Procedural Safeguards As Required Under The Second *Mathews* Factor

The second *Mathews* factor is "the risk of an erroneous deprivation of [the private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards . . . ." *Mathews*, 424 U.S. at 335. The majority below ignored Washington's procedural protections in evaluating the risk of erroneous deprivation of the private interest and the probable value of a higher standard of proof. App. 10 ¶ 18. The Uniform Disciplinary Act (App. 95), the Administrative Procedure Act (App. 130), and the regulations adopted by the Department of Heath (App. 155) provide substantial procedural safeguards including an administrative hearing, notice of the charges, the opportunity to be heard, the right to call witnesses, the right to be represented by counsel, and the right to judicial review. The Court below simply relies on *Nguyen*, which concluded that "none of these procedural safeguards can substitute for, nor is even relevant to, failure to impose the requisite minimum burden of proof which is specifically designed to impress the factfinder with the importance of the decision and thereby reduce the chance of error." *Nguyen*, 144 Wash. 2d at 530 (internal quotation marks omitted).

If this *Mathews* factor asked only whether the additional process sought might protect against erroneous deprivation of the private interest, then it always would favor greater procedural protection. But that is not the inquiry required under the second factor. Rather, the inquiry requires a *comparison* of *probable* outcomes, asking the *probable* value of the additional procedural protection in *light of existing procedural safeguards*. The majority below wholly failed to undertake this inquiry. Had it done so, and had it heeded the decisions of this Court discussed in Section 1.a., *supra* p. 16, majority

below would have concluded that the preponderance standard of proof chosen by Washington's policy-makers satisfies due process.

c. The Majority Below Ignored This Court's Decisions By Limiting The Third *Mathews* Factor To Fiscal And Administrative Burdens

The third *Mathews* factor is "the Government's interest, *including the function involved* and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335 (emphasis added). Relying only on its own decision in *Nguyen*, the majority below limits the third *Mathews* factor to the fiscal and administrative burden that a higher standard of proof would impose on the government. According to the majority below, the third prong of *Mathews* "does not relate to the interest which the government attempts to vindicate through the procedure itself." App. 11 ¶ 19. This conclusion ignores the state's strong interest in protecting patients from unfit health care providers and is plainly contrary to decisions of this Court.

In *Winship*, the Court considered the impact that requiring the beyond a reasonable doubt standard would have on the civil juvenile proceedings. The Court said: "Nor do we perceive any merit in the argument that to afford juveniles the protection of proof beyond a reasonable doubt would risk destruction of beneficial aspects of the juvenile process." *Winship*, 397 U.S. at 366. Similarly, in *Addington* the Court considered the state's "legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill." *Addington*, 441 U.S. at 426. To the same effect is *Santosky*, where the Court explained that

"[t]wo state interests are at stake in parental rights termination proceedings—a *parens patriae* interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings." *Santosky*, 455 U.S. at 766.

These decisions establish that the state's interest is not limited to fiscal and administrative concerns as the court below concluded. And this is not a situation in which the majority below simply misapplied the third factor. Rather, the court misstated and ignored the third factor set out in *Mathews*.

This fundamental departure from the Court's decisions is particularly egregious, as the additional process sought in this case—a higher standard of proof—directly bears on the state's ability to protect patients from unfit health care providers. In this respect, the decision below misunderstands the function of the standard of proof. "The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington*, 441 U.S. at 423. With the preponderance standard, the litigants "share the risk of error in roughly equal fashion". *Id.* For example, if the "standard of proof for a criminal trial were a preponderance of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent." *Winship*, 397 U.S. at 371 (Harlan, J., concurring). "Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each." *Winship*, 397 U.S. at 371 (Harlan, J., concurring).

The majority below did not assess the comparative social disutility of the two kinds of errors. Rather, the

court below chose the clear and convincing standard simply because under it fewer health care providers would be erroneously disciplined. But this ignores the state's vital interest in regulating the licensing of health care providers, and the consequence of a higher standard of proof for that interest. Under the higher standard dictated by the majority below, it is more likely that health care providers who have engaged in unprofessional conduct will not be disciplined—and patients will be put at greater risk of harm for that reason.

2. The Decision Below Conflicts With Every State Court Decision Considering Whether Application Of The Preponderance Standard In A Medical Disciplinary Proceeding Violates The Due Process Clause

It is also significant that the Washington Supreme Court stands alone. In our research, we have found no other decision holding that the preponderance standard violates the Due Process Clause in this context.[4] *Nguyen*

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[4] Colorado, Iowa, Michigan, New Hampshire, New Jersey, New York, North Dakota, Oregon, South Carolina, Texas, Vermont, Wisconsin, and the District of Columbia hold that the preponderance of the evidence standard does not violate the Due Process Clause in medical disciplinary proceedings. *See Snyder v. Colorado Podiatry Bd.*, 100 P.3d 496, 502 (Colo. Ct. App. 2004) ("There is no constitutional requirement of a standard of proof beyond preponderance of the evidence in civil proceedings, *see Addington v. Texas*, 441 U.S. 418 (1979); and the General Assembly has determined that the standard of proof for all violations of the Podiatry Practice Act is the standard applicable in civil proceedings."); *Sherman v. Comm'n on Licensure to Practice the Healing Art*, 407 A.2d 595, 601 (D.C. 1979) ("we hold that the preponderance of the evidence test adequately protected Dr. Sherman's Fifth Amendment property interest in his license"); *Eaves v. Bd. of Med. Exam'rs*, 467 N.W.2d 234, 237 (Iowa 1991) ("A preponderance of the evidence is all that is required. This standard is sufficient to satisfy due process." (Citation omitted.)); *Rucker v. Michigan Bd. of Med.*, 138 Mich. App. 209, 211, 360 N.W.2d 154, 155 (1984) (Petitioner is wrong in claiming "that due process required that a more stringent standard of proof, the 'clear and convincing' standard, be applied in license revocation hearings."); *Petition of Grimm*, 138 N.H. 42, 50, 635 A.2d 456, 461 (1993) ("After

acknowledged this conflict. *Nguyen*, 144 Wash. 2d at 521 n.3 ("Some jurisdictions have asserted the mere preponderance standard is sufficient to satisfy due process[.]").

The *Nguyen* majority cited *Johnson v. Board of Governors of Registered Dentists*, 913 P.2d 1339, (Okla. 1996), and *Painter v. Abels*, 998 P.2d 931 (Wyo. 2000), as decisions holding that due process requires clear and convincing proof in analogous circumstances. *Nguyen*,

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weighing the [*Mathews*] factors set out above, we conclude that the application of the preponderance of the evidence burden of proof to psychologist disciplinary proceedings satisfies due process."); *In re the Revocation of the License of Polk*, 90 N.J. 550, 569, 449 A.2d 7, 16–17 (1982) ("we conclude that the application of the burden of proof by a fair preponderance of the evidence standard in this case did not result in a deprivation of any rights guaranteed to Polk under . . . the Due Process clause of the Fourteenth Amendment"); *In re Gould*, 103 A.D.2d 897, 897, 478 N.Y.S.2d 129, 129 (1984) ("we reject petitioner's claim that the standard of proof in a professional license revocation proceeding must be 'clear and convincing' proof to comport with due process requirements"); *North Dakota Bd. of Med. Exam'rs-Investigative Panel B v. Hsu*, 726 N.W.2d 216, 230 (N.D. 2007) ("Under the *Mathews* framework for analyzing due process claims, we conclude the preponderance of evidence standard satisfies due process."); *Gallant v. Bd. of Med. Exam'rs*, 159 Or. App. 175, 185, 974 P.2d 814, 819 (1999) ("Balancing the three [*Mathews*] factors, we conclude that the Due Process Clause requires no more than the preponderance of the evidence standard of proof in this case."); *Anonymous (M-156-90) v. Bd. of Med. Exam'rs*, 329 S.C. 371, 378, 496 S.E.2d 17, 20 (1998) ("We find a preponderance of the evidence standard adequately protects a physician's property interest in his license."); *Granek v. Texas Bd. of Med. Exam'rs*, 172 S.W.3d 761, 777 (Tex. App. 2005) (the court rejects the contention "that due process requires clear and convincing evidence in medical disciplinary actions"); *In re Smith*, 169 Vt. 162, 172, 730 A.2d 605, 612 (1999) ("We conclude that these statutory procedures, together with the preponderance of evidence burden of proof placed on the State, afforded the constitutional process due to appellee."); *Gandhi v. Med. Examining Bd.*, 168 Wis. 2d 299, 303, 483 N.W.2d 295, 298 (1992) (the court rejected Gandhi's argument that "due process mandates proof of the allegations against a physician by at least clear and convincing evidence").

144 Wash. 2d at 521 n.3. However, while both of those decisions discussed the Due Process Clause, they were decided on state constitutional grounds. In *Johnson*, the court explained: "Because of the penal nature of disciplinary proceedings involving a professional license, the Oklahoma Constitution requires that the clear-and-convincing standard be applied in such disciplinary proceedings." *Johnson*, 913 P.2d at 1346. Similarly, in *Painter*, the court stated: "As a result, we hold [the preponderance standard] is also unconstitutional on due process grounds. This holding arguably gives Wyoming licensees greater due process protection than is required by the United States Constitution. This is permissible. Individual freedoms and protections are a priority in Wyoming." *Painter*, 998 P.2d at 941 (citation omitted).

Nguyen also relied upon *Silva v. Superior Court*, 14 Cal. App. 4th 562, 17 Cal. Rptr. 2d 577 (1993); *Ettinger v. Board of Medical Quality Assurance*, 135 Cal. App. 3d 853, 185 Cal. Rptr. 601 (1982); *Rife v. Department of Professional Regulation*, 638 So. 2d 542 (Fla. Dist. Ct. App. 1994); *Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987); *In re Zar*, 434 N.W.2d 598 (S.D. 1989); *Mississippi Board of Nursing v. Wilson*, 624 So. 2d 485 (Miss. 1993); and *Davis v. Wright*, 503 N.W.2d 814 (1993). *Nguyen*, 144 Wash. 2d at 522 n.3. However, none of these decisions involve the Due Process Clause. Rather, in the absence of a legislatively established standard of proof, these courts selected a standard of proof based on their views of appropriate public policy, not the Due Process Clause.

The fact that no other court has ruled that the preponderance standard violates the Due Process Clause in analogous circumstances further demonstrates that the majority below is not simply misapplying this Court's precedents—it is ignoring them.

3. The Decision Below Is Harmful To Patients In Washington And Other States

By requiring clear and convincing evidence, the decision below makes it more likely that providers who have engaged in unprofessional conduct will not be disciplined. This, in turn, increases the risk that patients will be exposed to unfit health care providers. And the decision to require a higher standard of proof is not just harmful to the citizens of Washington. In today's mobile society, health care professionals frequently move from state to state, sometimes for the purpose of avoiding the consequences of professional discipline. Indeed, in enacting the Health Care Quality Improvement Act, 42 U.S.C. § 11101 *et seq.*, Congress recognized this problem, finding "a national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance." 42 U.S.C. § 11101(2).[5]

To protect against such health care providers, state statutes typically include authority to deny a health care provider license, or take disciplinary action against a regulated health care provider on the strength of discipline taken by another state or jurisdiction.[6] The

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[5] Among other things, the Act requires state boards responsible for licensing physicians to report disciplinary actions relating to the physician's professional conduct to the Secretary of Health and Human Services. The information is compiled in a national data bank and made available to state licensing boards and certain health care entities. 42 U.S.C. §§ 11132(a), 11137(a).

[6] For example, with respect to nurses, see Ark. Code Ann. § 17-87-309(7); Cal. Bus. & Prof. Code § 2761(a)(4); Colo. Rev. Stat. § 12-38-117(1)(d); Del. Code Ann. tit. 24, § 1922(a)(7); D.C. Code § 3-1205.14(a)(3); Fla. Stat. § 464.018(1)(b); Ga. Code Ann. § 43-26-40(a)(2); Haw. Rev. Stat. § 457-12(a)(8); Idaho Code Ann. § 54-1413(1)(i); 225 Ill. Comp. Stat. 65/10-45(b)(10); Ind. Code § 25-1-9-4(a)(7); Kan. Stat. Ann. § 65-1120(a)(8); Ky. Rev. Stat. Ann. § 314.091(1)(i); Md. Code Ann., Health Occ. § 8-6A-10(a)(3); Mich. Comp. Laws § 333.16221(b)(x); Minn. Stat. § 148.261, subd. 1(4); Miss.

Washington Supreme Court's decision undermines this authority. The many states that would have taken into account Washington's disciplinary action against regulated health care providers based on a preponderance standard in their licensing and discipline decisions, no longer will have that option.[7] Thus, by dictating a clear and convincing standard of proof in such proceedings, the Washington Supreme Court's decision not only frees Washington health care providers from discipline in Washington based on a preponderance standard, it also effectively immunizes them from discipline in the numerous states that have determined to rely on health care provider disciplinary actions of sister states to protect their citizens.

It is, of course, conceivable that such states could independently try to prove Washington-based unprofessional conduct by health care licensees such as Ongom. But the obstacles to that course, including the lack of means to discover Washington-based professional misconduct, as well as additional logistical and financial burdens, would be daunting.

The Washington Supreme Court's decision thus has removed from residents of other states—states to which Washington health care providers migrate—the greater protection that Washington's preponderance

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Code Ann. § 73-15-29(1)(d); Mo. Ann. Stat. § 335.066.2(8); Neb. Rev. Stat. § 71-147(9); Nev. Rev. Stat. § 632.320(12); N.H. Rev Stat. Ann. § 326-B:37.II.(f); N.M. Stat. § 61-3-28(A)(8); N.Y. Educ. Law § 6509(5)(b), (d); N.D. Cent. Code § 43-12.1-14(2); Ohio Rev. Code Ann. § 4723.28(B)(1); Okla. Stat. tit. 59, § 567.8(B)(10); Or. Rev. Stat. § 678.111(1)(h); 63 Pa. Cons. Stat. Ann. § 224(a)(6); S.C. Code Ann. § 40-33-110(A)(4); S.D. Codified Laws § 36-9-49(6); Tex. Occ. Code Ann. § 301.452(b)(8); Vt. Stat. Ann. tit. 26, § 1595(2); Va. Code Ann. § 54.1-3007(7); Wash. Rev. Code § 18.130.180(5); Wyo. Stat. Ann. § 33-21-146(a)(vi).

[7] In addition to physicians and nursing assistants, Washington regulates more than twenty health care professions under its Uniform Disciplinary Act. *See* Wash. Rev. Code § 18.130.040.

standard afforded to them. In this respect, the decision below not only ensures that Washingtonians—including its most vulnerable populations—will be exposed to a greater risk of unfit health care providers, it also ensures that they will have considerable nationwide company.

CONCLUSION

For the foregoing reasons, the Petition For A Writ Of Certiorari should be granted.

RESPECTFULLY SUBMITTED.

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